DOCUMENT RESUME

ED 095 581 CS 201 552

AUTHOR	Terry, Herbert A.
TITLE	Personal Data and the Press.
PUB DATE	Aug 74
NOTE	52p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (57th, San Diego, August 18-21, 1974); Filmed from best copy available
EDRS PRICE	MF-$0.75 HC-$3.15 PLUS POSTAGE
DESCRIPTORS	*Civil Liberties; *Confidentiality; Federal Legislation; Freedom of Speech; Information Dissemination; *Journalism; Laws; Mass Media; News Reporting; State Legislation
IDENTIFIERS	*Freedom of the Press

ABSTRACT

Spurred on by a July 1973 report of an advisory committee to the Secretary of Health, Education and Welfare (HEW), a movement seems to be building to enact statutory protection for the privacy of personal data in government computers and other records storage systems. This effort to protect privacy poses challenges to statutory protection of public, and media, rights of access to public records and suggests a new dimension of privacy law with implications for the mass media. This paper analyzes the movement to protect privacy of personal data, with particular attention to the HEW report. It then examines, as a case study, the process which led to the only personal data protection law thus far enacted, a statute passed by the 1974 Minnesota legislature. The paper also reviews efforts to protect privacy of personal data at the federal level and to reach a reconciliation of access to records and privacy principles. Attention is paid to both Congressional and Executive branch institutions with interests in the subject. Finally, some suggestions are advanced as to why there has not yet been a successful simultaneous analysis of the principles of access to public records and the growing movement for privacy of personal data. (Author/TO)

BEST COPY AVAILABLE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED 095581

PERSONAL DATA AND THE PRESS: A Developing Dimension of Privacy Law

A paper presented to the Law Division, Association for Education in Journalism, 1974 Annual Convention, San Diego, California, August 18, 1974*

Herbert A. Terry, School of Journalism and Mass Communication, University of Minnesota**

With 1984 now but a decade away, and with much of the technology necessary for George Orwell's "vision" already at hand, personal privacy has recently become a concept increasingly crying for legal recognition. While it has, of course, been somewhat recognized in America ever since the famous Warren-Brandeis law review article of 1890,[1] recent developments, particularly developments related to protecting privacy in a computer age, tend to move away from the tort law perspective envisioned by the two Bostonians. At least one of these directions, the effort to protect the privacy of "personal data" in governmental records, poses new and as yet unresolved challenges to mass communication media and particularly conflicts with concepts embodied in access to public records legislation.

Privacy has had, at best, a fitful history in the United States. As a Constitutional right it is relatively new and undeveloped - slow to begin with, perhaps, because it is not a right enumerated in the Bill of Rights but rather one which must be created out of the pneumbras of other specified rights.[2] Although certain recent U.S. Supreme Court cases seem firmly committed to constructing a Constitutional right of privacy, other cases seem in opposition. The Court has ruled that there is a right of privacy, which cannot be infringed by government, (1) to practice contraception,[3] (2) to view admittedly obscene

---

*As this draft of this paper is being prepared (July 24, 1974) there is the possibility of substantial new Congressional action in this area. Accordingly this paper will be updated when presented to the AEJ convention August 18, 1974.

**1974-1975, Visiting Lecturer, Department of Telecommunications, Indiana University, Bloomington, Indiana 47401.

US 201 552

BEST COPY AVAILABLE

BEST COPY AVAILABLE

materials in one's own home,[4] and (3) to have an abortion.[5] Other decisions have also recognized privacy principles.[5a] On the other hand, the Court in Time, Inc. v. Hill (1967)[6] significantly increased the difficulties for plaintiffs in certain kinds of invasion of privacy actions against publishers when it linked the need to prove "actual malice," from the New York Times v. Sullivan libel case[7] with privacy actions based on the publication of non-defamatory falsehoods; a case in which some find a retreat from the Court's interest in protecting privacy. Some have also interpreted the Court's recent upholding of statutory provisions requiring the microfilming of certain records of bank accounts as indicating reduced interest by the Supreme Court in privacy.[8a]

At the common law, the history of privacy is convoluted and sometimes contradictory. Its intricacies have been adequately described by others[9] and need not deeply concern us here. Suffice to say that, as a problem for the press, privacy law has thus far been primarily significant only in so far as the tort law of privacy is concerned. To simplify drastically, the press is usually secure from successful punishment for an invasion of privacy if the material published has come from a public record. Major authorities on privacy and the press agree in this regard:

> ...the existence of a public record has usually prevented recovery for invasion of privacy. Even if persons are embarassed by publication of dates of a marriage or birth, or information which is a matter of public record, publications accurately based on such records have escaped successful lawsuits. The catch here seems to be that the basis of the report must be a record kept by a government agency and which is a record open to the public...Where there is a legitimate public record - and the media's use of that record is not forbidden by law - the material may be used for publication without fear of suit.[10]

> It is virtually a maxim in the law of privacy that any report taken from the public record is privileged under the heading of newsworthiness.[11]

Don Pember, a major scholar of privacy and the press, has remarked - particularly in the wake of Time, Inc. v. Hill - that "...the privilege or defense against" privacy suits arising from the publication of truthful news stories "is so large that the remedy has little potency. And this is perhaps the way it should be."[12]

BEST COPY AVAILABLE

In many ways paralleling the development of privacy law, there has been a substantial growth of access to public meetings and public records legislation since World War II. The parallel is significant because of the already mentioned relationship between successful defense against privacy actions and the existence of a public record. The drive for statutory rights of access to records has received substantial lobbying support from journalistic organizations, not only because such statutes produce more information for journalistic use but also because they expand protection from libel and privacy actions.

Statutes guaranteeing access to public records are now on the books of most states[13] and Congress, in 1966, passed the Federal "Freedom of Information Act" which applies to substantial volumes of records of Federal agencies.[14]

As with the right of privacy, the right of access to public records is not a specifically enumerated Constitutional right. In fact, no U.S. Court appears ever to have ruled that the First Amendment, standing alone, creates a right of access to public records, although First Amendment considerations are certainly involved.[15] Under the common law, two important dimensions of rights of access to records emerged: First, that a public record was one required by law to be made or kept, not a record made only for administrative convenience; Second, that access to public records - as so defined - was granted only to those with some sort of special interest in the records in question, an interest not usually accorded abstractly to mass media personnel. Statutory access laws, although many have attempted to broaden the definition of public records beyond records required by law to be kept, have been primarily successful in removing the common law requirement of "interest."[16] Certainly this has been the effect of the Federal "Freedom of Information Act," which makes records available to "any person"[17] without any requirement of a requester to state his reasons for seeking access to information.

It is, of course, almost inevitable that these two concepts - the "right to know" as embodied in access to records legislation and the "right to be let alone" of privacy law could co-exist only with some tension and would occasionally find themselves in direct opposition. As has been accurately observed, "anyone studying the law of privacy and the mass media soon encounters a basic philosophical problem, the same one with which courts have been faced throughout the history of privacy: Which is more important, the protection given to society by a free and unfettered press, or the peace of mind given the individual by rigid protection of the right to privacy?"[18]

The conflict between access to public records and rights of privacy can, of course, be somewhat solved by legislation - at least legislative decisions in the area can be made. Few access to records statutes are so absolute in their terms that they do not prevent the legislative body involved from making statutory exemptions to their provisions. In the past most such exemptions have been narrow and essentially ad hoc - legislatures, for example, commonly decide to regard tax returns and certain kinds of accident reports as confidential by statute and hence exempt from mandatory disclosure. What is significant about current conflicts between access to records principles and privacy principles is that legislative consideration is now being given to exempting from public disclosure a very broad category of information - "personal data" rather than sticking to the past approach of narrowly defining certain records as non-public, usually in the legislation which calls for the creation of the record to begin with. This has been accelerated due to legislative concern with records contained in computerized data systems. In setting the boundaries of his 1972 classic, Privacy and the Press, Pember excluded from consideration as a press problem "the gathering of data in a single national center...for lack of a significant publication about the injured party."[19] The interrelationships of public records concepts, computers and the concept of privacy of "personal data" can no longer be dismissed so lightly

Privacy is certainly a topic which has received significant legislative and public interest in recent years. Despite all such interest, however, there has been little comprehensive legislation from the U.S. Congress, or from the states, to protect it. Probably the most significant general Federal legislation in the area is the Fair Credit Reporting Act of 1970[20], an act intended to protect citizens from some abuses of data by commercial credit reporting firms. In fact, the prospects for general privacy legislation in the U.S. Congress remain small, although they are growing.[21] At the state level, however, interest in general personal privacy legislation may be rapidly accelerating and in at least one state, Minnesota, a bill has already been enacted attempting to guarantee to citizens the privacy of their "personal data." The process by which that law came to be enacted, and the problems for the press reflected in that process, may very likely be repeated in other states in the next few years and are worthy of examination. As a recent issue of the Press Censorship Newsletter observed:

> There is an increasing conflict between the right of the public to know about the operation of government programs and the right of privacy of the individuals in these programs. The two informational trends conflict when the news media attempt to obtain information about programs which involve a citizen's private life such as health, housing, welfare benefits, prison life, criminal background, etc. As government social welfare programs expand, more and more persons will be receiving public money and services which the press will wish to monitor. Also, the use of computer banks makes this information about an individual more readily available than in the past.[22]

THE CONCEPT OF PERSONAL DATA

The intellectual history of the concept "personal data" would probably be impossible to trace fully. In a sense, however, the effort need not be made as a single publication has, in the last year, done more than any prior source to popularize the concept among legislators and has contributed significantly to legislation designed to protect privacy by restricting public access to "personal data." In 1972, then Secretary of Health, Education and Welfare Elliott L. Richardson established a 25 member "Secretary's Advisory Committee on Automated Personal Data Systems." The report of that advisory

BEST COPY AVAILABLE

committee, submitted to HEW Secretary Casper W. Weinberger June 25, 1973 and published the next month as Records, Computers, and the Rights of Citizens[23] has become something of a best seller of the Government Printing Office and is clearly the most important current document in this area. It has stimulated substantial interest at many levels of the Federal government and, at the state level, appears to be receiving great attention. Its recommendations are heavily reflected, as we shall see, in the recently enacted Minnesota statute.

Broadly speaking, the advisory committee recommended enactment of a statutory "code of fair information practice," with penalties, both civil and criminal, for its violation. The overall thrust of the recommendations was twofold. First, to increase citizen knowledge about records keeping systems which contained information about that citizen; and second, to increase citizen control over the information by giving him an opportunity to influence its dissemination and, if necessary, to challenge its accuracy and/or completeness.[24]

Certain provisions of the code seem to pose problems to some developed concepts of access to public records and the use made of such records by the news media. Perhaps the gravest problem of all is the definition of "personal data" itself. As defined by the advisory committee:

> "Personal data" include all data that describe anything about an individual, such as identifying characteristics, measurements, test scores; that evidence things done by or to an individual, such as records of financial transactions, medical treatment, or other services; or that afford a clear basis for inferring personal characteristics or things done by or to an individual, such as the mere record of his presence in a place, attendance at a meeting, or admission to some type of service institution.[25]

This is certainly a broad definition which, if applied to existing public records, encompasses much data which in the past has been of interest to the press and has been readily available to them.

The actual provisions of the "Code of Fair Information Practice" also contain some sections that pose difficulties to existing press use of public

BEST COPY AVAILABLE

records. Record keepers would be required, among other things, to "maintain a complete and accurate record of every access to and use made of any data in the system, including the identify of all persons and organizations to which access has been given;"[26] to publish "a description of all types of use (to be) made of data, indicating those involving computer-accessible files, and including all classes of users and the organizational relationships among them;"[27] to "assure that no use of individually identifiable data is made that is not within the stated purposes of the system as reasonably understood by the individual, unless the informed consent of the individual has been explicitly obtained;"[28] "inform an individual, upon his request, about the uses made of data about him, including the identify of all persons and organizations involved and their relationships with the system;"[29] and "assure that no data about an individual are made available from the system in response to a demand for data made by means of compulsory legal process, unless the individual to whom the data pertain has been notified of the demand."[30]

The possible implications of these requirements for the press are plain. Records would be maintained of each time press representatives had access to personal data concerning an individual, and the record of this use of data would be available to the data subject - potentially an undesirable situation were the press investigating, say, the past criminal record of a candidate for public office. Further, the code seems to suggest that if a data subject was not on reasonable notice, at the time he supplied the data to the system, that it would be available for public inspection, such inspection may not be granted until the informed consent of the data subject is obtained. Coupled with the very broad definition of "personal data," potential problems for press access to public records containing personal data seem large indeed.

The HEW advisory committee was not entirely unaware of these problems of reconciling its privacy of personal data concept with the motivating notions

BEST COPY AVAILABLE

and related legislation - of access to public records. In fact, it suggested at least one amendment to the Federal Freedom of Information Act. That Act creates a broad right of access to public records, except those that fall within nine stated exemptions.[31] Federal agencies, if asked for access to records, may withhold access only if the records sought are covered by one or several of those exemptions. Seven of the nine exemptions, as the HEW study group rightly observed, leave discretion to the records keeper as to whether or not he will permit public examination of records which are arguably exempt. Congress, however, has provided no statutory guidance for the records custodian in deciding whether or not to withold public access to a record which is arguably exempt under the two remaining exemptions. The HEW advisory committee suggested that the Freedom of Information Act be amended to require agencies to "obtain the consent of an individual before disclosing in personally identifiable form exempted-category data about him..."[32] In addition, the committee recommended that "it should be the responsibility of the person or organization that seeks to obtain data by compulsory legal process to notify the data subject of the demand and to provide evidence of such notification to the system. In instances where it may be more practicable for the system to give notice of the demand to the data subject, the cost of doing so should be borne by the originator of the demand."[33]

Obviously this system could have three consequences for the press. First, it would lengthen the already lengthy process of filing for suit for access to information under the Freedom of Information Act by adding the time required to obtain a data subject's permission. Second, it would increase the cost to the data seeker. Finally, it would, as with other provisions already quoted, put the data subject on notice that the press was, for one reason or another, investigating his activities.

BEST COPY AVAILABLE

In general, the advisory committee seemed to have a less than enthusiastic regard for the Freedom of Information Act, at least when it tried to reconcile the act with its interests in protecting the privacy of personal data:

> The Freedom of Information Act mandates disclosure to the public of information held by the Federal government. It barely nods at the interest of the individual record subject by giving Federal agencies the authority to withold personal data whose disclosure would constitute a clearly unwarranted invasion of privacy. The Act, however, is an instrument for disclosing information rather than for balancing the conflicting interests that surround the public disclosure and use of personal records. The Act permits exemption from mandatory disclosure for personal data whose disclosure would constitute a "clearly unwarranted invasion of personal privacy," but the agency is given total discretion in deciding which disclosures meet this criterion. The Act gives the data subject no way at all to influence agency decisions as to whether and how disclosure will affect his privacy.[34]

The advisory committee has a similarly negative criticism of state access laws:

> Many of the states have similarly broad "public records" or "freedom of information" statutes whose objective is to assure public access to records of State government agencies. Most of them, however, provide no exemptions from their general disclosure requirements in recognition of personal privacy interests.[35]

In sum, the HEW advisory committee report seems to pose many unresolved challenges to the concept of public access to public records, and particularly to that access to records depended upon by the news media. The report was, it should be remembered, advisory - what will really matter to the press is how and to what extent its suggestions come to be embodied in statutory or administrative law. The first such embodiment has already occurred, and it is to that case study which we now turn attention.

"PERSONAL DATA" AND MINNESOTA - THE FIRST STATE LAW

Before launching into a lengthy description of how Minnesota arrived at its privacy of personal data bill, an explanation of the value of such a study - attempting to discount criticisms of parochialism - is in order. Certainly other states, if they take up this subject, as I expect they will, may follow different procedures and end up with different laws. The parties in interest, however, and at least some of the press access-privacy conflicts which occurred in Minnesota, may turn out to be common to many future efforts to legislate in this area. It is hoped that by describing the process as it

BEST COPY AVAILABLE

occurred in Minnesota, and offering some criticism of the product, future scholars in this field can have a data base with which to more fully understand how privacy of personal data may be better reconciled with access to public records principles.

The concept of privacy of computerized data has, admirably, long been of interest to many in the data systems field. Operators of computer systems, it appears, were not terribly slow to recognize the privacy violation potentials of their accelerated information processing techniques and, almost since the beginning of computer data handling technology, have paid some attention to problems of security of computerized data. On the other hand, some such systems operators appear also to have been motivated by a degree of fear about what might someday occur should legislators get seriously interested in preserving privacy from computer invasion. Accordingly, many organizations of computer information systems personnel have, from time to time, been created to study personal data security problems and to anticipate potential legislative controls.

Such a group grew up in Minnesota prior to express legislative interest in the problem. Beginning in approximately 1970, an ad hoc, unofficial, group of public officials in the information systems field, plus representatives from the intellectual community concerned with information handling, began to meet to consider common information services concerns.[36] The number of people involved was variable and data security problems, such as those of "personal data" were not their primary concern. The group, called the State-Local Data Systems Council, was chaired by the Executive Director of the League of Minnesota Municipalities, Dean Lund. Its primary objective was to talk about mutual data handling problems of governmental administration.[37]

BEST COPY AVAILABLE

In 1971, primarily it appears at the urging of an Assistant Commissioner of Administration in charge of the Minnesota Information Services Department (the state's primary computer operator for information purposes), the legislature gave official recognition to this ad hoc organization.[38] By Laws 1971, Ch. 918, Sec. 2 the legislature gave the governor power to appoint an advisory council called the "intergovernmental information services advisory council, consisting of representatives of county, municipal, school district and regional governing bodies which shall assist the department (of administration) in the development and coordination of an intergovernmental information services master plan to coordinate and facilitate services, techniques, procedures and standards for the collection, utilization and dissemination of data by and between the various spheres of government."[39] Members of this advisory council were finally appointed in February, 1972 and were essentially not much different than the prior ad hoc group.[40] Lund remained as chairman. This group, known as IISAC, obviously had a charge much broader than consideration of "personal data" privacy matters alone.

A little over a year following the formation of IISAC, the 1973 Minnesota House of Representatives passed "a bill for an act relating to the collection, security and dissemination of records and information by the state," - House File 1316. The bill was essentially drafted by the Assistant Commissioner of Administration who had helped create IISAC, Daniel Magraw,[41] but IISAC did not participate in its drafting.[42] It was considered rather late in the legislative session by the House of Representatives. It passed the house and was transmitted to the Senate May 9, 1973. The legislature adjourned May 21, 1973 without the approval of H.F. 1316 or any companion measure by the Senate. Senate inaction is commonly credited to the lobbying efforts of the Executive Editor of the Saint Paul Pioneer Press and Dispatch,[43] John Finnegan, who argued that the bill in its 1973 form posed a threat to press rights of access to information.

The bill's objective, naturally, was to control the dissemination of "data on persons" (the Minnesota phrase for "personal data") that would invade personal privacy. H.F. 1316 adopted a definition of "data on persons" different from that proposed a few months later by the HEW advisory committee. H.F. 1316 defined "data on persons" as:

> all records, files and processes which contain any data of a systematic nature on any legal person, which data are kept or intended to be kept on a permanent or semipermanent basis for the purpose of assisting in the administration of a governmental agency or program. Such data includes that collected, stored, and disseminated by manual, mechanical, electronic, or any other means.[44]

This definition has persisted, and is used in the bill finally adopted by the 1974 legislature. H.F. 1316, in its 1973 version, applied only to state data systems and did not reach the data systems of cities, villages, towns, school districts and other political subdivisions of the state. It has been said that removing such local institutions from the coverage of the bill was essential to get it through the House of Representatives at all.[45]

Under the 1973 version of H.F. 1316, the Commissioner of Administration was given substantial power to promulgate rules to control the collection, dissemination and integration of data on persons. Although he was to do so "with the advice of the intergovernmental information services advisory council,"[46] and was to follow guidelines in preparing the rules and regulations - guidelines contained in H.F. 1316[47] - the actual adoption of rules and regulations was not a matter of statute but was to be accomplished under the general rule - making power of the commissioner, a feature, as it turned out, objectionable to both the legislature and the press.

Although H.F. 1316 passed the Minnesota House in 1973 without attracting much public interest, it was vigorously opposed in the Senate, as already mentioned, by press interests. They generally had two concerns with the bill. First, the tremendous rule-making power granted the Commissioner, in making non-public personal data, was objectionable. Press interests preferred to

BEST COPY AVAILABLE

see the legislature retain more direct control over the process of actually deciding what data would be regarded as "data on persons."[48] Second, a provision of H.F. 1316 which stated that "Notwithstanding Minnesota Statutes, Section 15.17 rules and regulations issued hereunder shall govern and control the collection, security, and dissemination of all recorded information by the state of Minnesota" (emphasis added)[49] was troublesome. Minnesota Statutes Section 15.17 is Minnesota's general public records statute and to members of the press, this bill appeared to give the commissioner of administration power essentially to repeal that statute by rule and regulation.

During the interim between the 1973 and 1974 sessions of the legislature, IISAC established a committee on "Data Security and Privacy" to review H.F. 1316 and make recommendations for amendments, if needed, of that act prior to the beginning of the 1974 session when Senate action was expected. The Committee was chaired by IISAC member Jerome J. Segal, an Assistant City Attorney of the City of Saint Paul, and included representatives of the governor, law enforcement organizations, a regional political body, education groups plus another city attorney, a municipal court judge and H.F. 1316's essential author, Magraw. In addition, a student who had been a member of the HEW advisory committee served on the IISAC Data Security and Privacy committee.[49a] Finally, John Finnegan was added as a member, although he was not a member of the parent organization, IISAC, because he had been "so concerned and vocal," and Lund, IISAC's chairman, believed "his point of view was a legitimate one."[50]

This committee reviewed H.F. 1316 making several suggested changes and submitting a revised version of the bill for approval by IISAC.[51] IISAC approval was gained, and the revised version was eventually presented for Senate consideration. The IISAC version returned counties, cities, towns, villages and school districts to the scope of the bill. More significantly, it tried to deal with press objections to the original version of H.F. 1316. Although substantial rule-making authority remained with the Department of Administration,

BEST COPY AVAILABLE

the Department was clearly blocked from promulgating rules regarding the dissemination of data on persons that would be in conflict with the state's public records law. A portion of the cover letter which accompanied the committee's report to IISAC explains this better than would reference to the proposed revised version of the bill:

> Minnesota Statutes, Section 15.17, Subdivision 4, provides that except as otherwise expressly provided by law, all public records may be inspected, examined or copied at reasonable times, subject to payment of reasonable fees. Only the legislature, by statute, should exempt any record from public scrutiny. Stated another way, only the Legislature, by statute, should determine what records or data on persons should be confidential.
>
> . . .
>
> The Legislature should not delegate to administrators the power to exempt data from the open public records law set forth in Minnesota Statutes, Section 15.17. The establishment of confidential records and data on persons should be established by the Legislature, and the adoption of rules and regulations governing the day-to-day handling of such data and records should be delegated to the Commissioner of Administration.[52]

Obviously, in so exempting from the "personal data" bill records which were public records by statute, the IISAC proposed revision of H.F. 1316 was substantially different than the original bill, which gave the director of administration power to exempt records from Minnesota Statutes Sec. 15.17. This was, apparently, almost entirely the result of John Finnegan's impact upon the IISAC Data Security and Privacy Committee.

In November, 1973, a member of the Minnesota Senate Judiciary Committee, Senator Robert Tennessen (Minneapolis) organized a subcommittee on Problems of Privacy.[53] Tennessen was not particularly satisfied with the House version of the personal data bill and submitted four bills of his own. One was closely modeled on the HEW advisory committee report, released four months earlier.[54] The other three bills dealt with (1) specific prohibitions concerning the integration of previously separate data systems[55] (2) restrictions upon the use of social security numbers as subject identification numbers[56] and (3) restriction on the unlawful interception of computer transmitted data.[57]

BEST COPY AVAILABLE

Between November 13, 1973 and March 5, 1974 the Subcommittee on Problems of Privacy held nine sessions on proposed legislation dealing with "data on persons" or "personal data." Time and space do not here permit a full detailing of the committee's actions in a chronological sense. Rather, it seems to better serve present purposes to point out the parties who became involved in the hearings of these bills and to summarize their interests. Suffice to say that the outcome, the bill ultimately passed by the Senate, accepted by the House and enacted into law was a hybrid of the HEW recommendations and the original H.F. 1316. The bill dealing with specific prohibitions of data integration was somewhat incorporated into the final enactment. The specific prohibitions on the use of the social security number and the effort to control unlawful interception of transmitted data were dropped.

THE PARTIES AND THEIR INTERESTS

Basically six parties became involved in the refinement of the legislation: (1) the author, Senator Tenessen, (2) the state's computer industry, (3) IISAC, (4) the Department of Administration (specifically Magraw), (5) other portions of state and local governmental bureaucracy and (6) media representatives. Their roles and interests can be described as follows:

(1) The author - Sen. Tenessen. The author had a substantial personal, as opposed to political, concern in seeing that legislation in this area was passed. There are few political rewards in supporting this kind of legislation and his interest appeared motivated by a very sincere and indeed altruistic interest in threats of record-keeping to personal privacy. He proved to be an accommodating chairman, as his prpposed bill went through four drafts before finally moving out of subcommittee and was amended even after that. A subjective judgment would surely be that the bill improved with each revision. In an interview subsequent to the passage of the law, the Senator admitted that he had no profound commitment to the four bills he originally introduced and that the

BEST COPY AVAILABLE

whole effort was just to get a "crude bill" enacted which would begin to protect personal data privacy rights but to which the Legislature would be required to give additional attention in later sessions. To some extent, he expects to have to return to the conflicts between privacy of "data on persons" and press access rights.[58]

(2) The computer industry's concern was threefold. First, that no steps be taken that would reduce the demand for computer products. Minnesota is home to Honeywell and Control Data Corporation, both large computer producers and important state employers. Second, that restrictions on security of computer data would turn out to be compatible with the interstate nature of computerized information exchange, a position generally responsible for industry support for Federal, as opposed to state, legislation.[59] Finally, that any requirements enacted to require records to be kept of access to computer data be manageable - that the computer not be required to generate more records about access to records than it had records to begin with. Although the industry was actively represented in early hearings, its attendance seemed to drop off with time. Most probably the industry became convinced that many of its more technical concerns with language of the bill would be protected by the State Department of Administration, a heavy computer user.[60]

(3) IISAC - Jerome Segal attended many subcommittee meetings. Usually his contribution was to remind the Subcommittee on Problems of Privacy of the recommendations of IISAC and to insist on three things. First, that an adequate reconciliation of the privacy of "data on persons" concept be made with public records legislation, generally recommending that "personal data" legislation, if passed, not apply to public records. Second, to insist that local governmental units be included and finally, to suggest that there be both civil and criminal penalties associated with violation of provisions of the enactment.[61]

(4) State Department of Administration - Magraw. The Department of

BEST COPY AVAILABLE

Administration's interests were broad. Like IISAC, Magraw argued for a comprehensive bill including all levels of information keeping in the state. In addition, the Department of Administration was probably the party most concerned with the refinement of wording of the proposed bill, as they sought to avoid a bill that would place impossible burdens upon them in terms of implementation of the law. In the end, the Department of Administration was required to prepare an annual report to the legislature (1) listing all data systems and describing them (2) offering a commissioner's opinion on which data therein were public records, which confidential and which neither, (3) giving information in public form about those responsible for each system and data bank and describing the types of individuals upon whom data is maintained, the categories of data sources, a description of the use of the data, the policies of storage, retention, and disposal, the security systems employed, and procedures which may be used by data subjects to find out if data is filed on them, get access to it, and contest its accuracy, completeness, pertinence and the necessity for retaining it. However, the Commissioner is charged with fulfilling these activities only to "the extent feasible", a disclaimer not found until the third draft of the legislation.[62]

(5) Other bureaucrats entered only occasionally. Some representatives of local government, unsatisfied at being included in the bill, appeared and received polite attention, but their position was in vain as the clear preference of the Chairman and other powerful parties was for a comprehensive bill.[63] Late in the consideration of the bill, representatives of health organizations in the state managed to get in an amendment which exempted from the requirements of disclosure to the data subject "records relating to the medical or psychiatric treatment of the individual."[64]

(6) Media representatives. As already noted, representatives of media organizations were distressed that the original H.F. 1316 seemed to them to strike an inadequate balance between the state's public records laws and the

BEST COPY AVAILABLE

striving to protect personal privacy of "data on persons." As is true of many state access laws, Minnesota Statutes Sec. 15.17, subd 4. provides for general public access to public records "except as otherwise expressly provided by law." Media members were afraid that the personal data bill would be such an express exception to the access to records law. The media viewpoint was effectively heard in the IISAC committee, as already mentioned. They continued their interest into the hearings of the Senate subcommittee, but Finnegan was replaced with a different spokesman of the media viewpoint, Robert Shaw, manager of the Minnesota Newspaper Association, an association of most of the state's non-metropolican newspapers.

Certain legislative groundwork was done. A comprehensive study of the public records law and related statutes was commissioned.[65] Unfortunately the study revealed certain weakensses in the law, at least as judicially construed, but a decision was made nonetheless to continue to push for some reconciliation between the public records law and the personal data bill, with plans for a later strengthening of the public records law. Throughout the subcommittee's hearings, media representatives testified that inadequate consideration had been given to the conflict between the "right to know" and examine public records concept and the effort to protect personal data privacy. Finally, near the end of the hearings, a restrictive application clause was drafted by media representatives and presented to the subcommittee saying "Nothing in" the bill "shall be construed to restrict or modify right of access to public records guaranteed by Minnesota Statutes, Section 15.17, or by any other statute."[66] Having repeatedly assured media representatives that there was no intended conflict between the public records law and the personal data bill, the subcommittee had little choice but to accept this amendment. It was approved and ended up in the final version of the law. Having accomplished what was essentially a delaying action, media representatives absented themselves generally from the final few sessions of the subcommittee which were primarily devoted to

BEST COPY AVAILABLE

settling final objections of the Department of Administration to certain phrases in the language of the bill.

The bill moved out of subcommittee March 5, 1974; out of the full Senate Judiciary committee March 7, 1974, was approved by the Senate March 25, 1974, concurred in by the House March 26, 1974 and signed by the governor April 11, 1974. Tentatively codified as Minnesota Statutes, Secs. 15.162-15.168, the bill became effective August 1, 1974.

THE PROVISIONS OF THE BILL

The Minnesota enactment is attached in full as Appendix A. In general it follows the HEW recommendations, for it provides for public knowledge of the existence of data banks, for substantial public information about how such banks are operated and the purposes for which information is obtained and exchanged, and for provisions for data subjects to gain some knowledge of data stored about them and challenge its accuracy. There are two significant differences between the Minnesota statute and the HEW guidelines. First, the statute requires the Department of Administration to do substantial research into state record-keeping and to report its findings to both the public and the Legislature. This will be a valuable information base for the Legislature in considering refinements and amendments to the law and will also, perhaps, be a boon to the media in identifying many hitherto unknown sources of information. Second, the Minnesota statute provides subjects less actual knowledge about who has had access to their data than recommended by HEW. In addition, the Minnesota statute applies to "data on persons" however maintained. The HEW study noted, however, that that advisory committee really saw no need to create different data privacy rights for automated and non-automated data systems.

With more direct attention to press interests, some of the potentially objectionable portions of the HEW study remain; for example, data use for other than announced intended uses remains difficult, unless protocols are changed by data gatherers, by legislative approval or with consent of the data subject. The

BEST COPY AVAILABLE

restrictive application clause, however, should solve - primarily by postponement - major press problems with the statute. That the restrictive application clause is but a temporary holding action, to which the legislature must return its attention at a later date, appears understood by both representatives of the press and the sponsor of the legislation.[67]

FEDERAL INTEREST IN PRIVACY

When interviewing was conducted in Washington D.C., in late April, 1974, in conjunction with this paper it appeared unlikely that a comprehensive, general "personal data" bill would be enacted by the U.S. Congress. That situation has changed drastically between April and the writing of this draft of this paper. There now appears to be some likelihood that Congress may enact such a bill this session; powerful groups attempting to enact such legislation are now accelerating their efforts to get general privacy law proposals through the House of Representatives prior to expected debate in that body of articles of Presidential impeachment anticipated in mid-August. If such legislation can go through the House prior to its taking up the question of impeachment, Senate action along the lines enacted by the House is expected and a general "personal data" privacy bill may well become law. House and Senate activity in this area shall be reviewed shortly, after discussion of more limited and "specific" protections of privacy also being considered have been reviewed.

Both the House and the Senate are considering bills that might severely restrict press access to criminal justice data. Two bills in this area were introduced in the Senate February 5, 1974. S. 2964, the "administration bill" sponsored by Nebraska Senator Roman Hruska regulates all criminal justice data banks of federal, state and local governments and would bar dissemination of arrest information if arrested individuals were subsequently acquitted, had their charges dismissed, or were not prosecuted. Indictment and conviction

BEST COPY AVAILABLE

information could be distributed only for criminal justice purposes, and would not be made public unless authorized by federal or state statute or executive order. There are further provisions for sealing criminal records if an individual has been free from law enforcement activities for periods of from five to seven years.

Senator Sam Ervin's "The Criminal Justice Information Control and Protection of Privacy Act" (S. 2963), introduced the same day, is in many ways similar to but perhaps even more restrictive than the Hruska bill. It would totally prohibit distribution of raw arrest information to non-law enforcement agencies or persons, would permit conviction information to be released only under federal or state statute, and would place more limits on the dissemination of arrest records within the criminal justice system. All of the provisions of the bill would be administered by a nine-member federal-state board of government officials and private citizens. The Hruska bill would be enforced by the Attorney General. Hearings were held on both bills in March, 1974.[68]

Similar kinds of criminal data restrictive legislation has been introduced in the House and hearings were held on them by a subcommittee of the House Judiciary Committee (Subcommittee on Civil Rights and Constitutional Rights, Don Edwards, D.-Calif., chairman) in March, 1974.[69] Such legislation, regulating only access to criminal justice information, appeared more likely of enactment than any general privacy of personal data legislation during the April interviewing for this paper.[70] Since the legislation, however, is under the control of a House member who is also a member of the Judiciary Committee, and hence deeply involved in the current impeachment deliberations, chances of its passage by the current congress appear diminished.

These bills regulating criminal justice data have met substantial opposition from the press. Press representatives on hearings on the Senate bills argued that they would make non-public much criminal justice information that is now

BEST COPY AVAILABLE

public.[71] Ervin disagreed. For him, no information currently public would be made non-public, but rather certain forms and compilations of information which are now public would be made non-public. This, admittedly, might make it harder for the press to compile some combinations of data but, according to Ervin, it should not be the business of government to provide compilations of data for the press which invade the privacy of data subjects.[72] Press representatives argued with Ervin that existing press-bar guidelines often recommend making public data Ervin now seeks to make non-public, and stressed possibilities for abuse under the cloak of secrecy created by both the Ervin and Hruska bills. In late July, 1974, Ervin's Constitutional Rights Subcommittee of the Senate Judiciary Committee was marking-up a revised version of the Ervin and Hruska bills which, according to counsel to the subcommittee, "went-far" to remove some of the objections raised to the original bills by press representatives.[73] The subcommittee's mark-up bill, however, has not yet been made public.

Major Congressional action is now going on in the area of general "personal data" privacy bills. Both Senate and House subcommittees are currently refining proposed legislation, generally modeled on the HEW fair information practice guidelines and aiming toward enactment of the legislation prior to House consideration of articles of Presidential impeachment. In this they compete with other bills seeking to be heard by the full House prior to its consideration of impeachment so that passage of these bills by the House is by no means assured. The situation should be clearer by the time of the AEJ Convention.

Moves to protect privacy of "personal data" generally appear to have begun earliest in the House. There New York congressman Edward Koch introduced H.R. 12206 and 12207 on January 22, 1974. These bills were revisions of earlier general privacy bills introduced by Congressman Koch in earlier congresses. Another important general privacy of "personal data" bill was introduced by Congresswoman Bella Abzug (D. New York) as H.R. 13872 on April 2, 1974.

BEST COPY AVAILABLE

Pursuant to special orders, a lengthy debate was held on the House floor on the "Congressional Commitment To Privacy" on April 2, 1974.[74] This House debate revealed support for general protections of privacy of personal data to be both deep and bi-partisan. What is perhaps of greatest significance is that the Koch bills, and other related bills, were referred not to the judiciary committee, now so heavily engaged with the problems of impeachment, but rather to the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee. The primary responsibility of that subcommittee is Freedom of Information matters - the subcommittee, chaired first by California Congressman John Moss and later by Pennsylvania Congressman William Moorhead was the primary subcommittee responsible for the Federal Freedom of Information Act.

The subcommittee held hearings on the Koch bill and related bills February 19 and 26, 1974 hearing testimony from members of Congress, representatives of the Justice Department and the Department of Health, Education and Welfare, and a professor from the Rutgers School of Law. Partly as a result of the hearings, but also as a result of consultation with members of the Senate and of the executive branch of government, the Koch bill was revised and reintroduced by Congressman Barry Goldwater, Jr. (R.-Calif.) as H.R. 14493 April 30, 1974. That bill, which has come to be known as the "Goldwater-Koch" bill, underwent mark-up sessions in the subcommittee June 18, 26, 27 and July 22. The subcommittee has not, as yet, recommended a final version of the bill for consideration by the full committee. Accordingly, present comments can only be directed to the "Goldwater-Koch" bill as proposed April 22.

As with most recent bills dealing with privacy of personal data, the "Goldwater-Koch" bill is heavily indebted to the HEW advisory committee report. As with the HEW report, the general purpose of the Goldwater-Koch bill is to insure that there are no secret data banks, that citizens know when there is data stored about them and have both access to the data and an opportunity to

BEST COPY AVAILABLE

challenge the data or file supplementary data. In addition, the Goldwater-Koch bill provides for security and confidentiality of "personal information" and accordingly raises some challenges to access to information concepts.

The earlier version of the bill provided generally that agencies maintaining personal information could not disclose the information to another agency or individual without notification to the data subject. This version of the bill expressly provided that:

> ...if disclosure of such record is required under section 552 of this chapter or by any other provision of law, the person concerned shall be notified by mail at his last known address of any such required disclosure.[75]

The mentioned section 552 is, of course, the Federal Freedom of Information Act and, accordingly H.R. 12206 appeared to infer that "personal data" contained in records which were public records pursuant to the Federal Freedom of Information Act or other laws was not to be confidential but was to be made public but with notice to any involved data subject.

This provision does not appear in H.R. 14493. Accordingly H.R. 14493 appears to have not fully resolved conflicts between Freedom of Information and privacy concepts. H.R. 14493 adopts a very broad definition of "personal information:"

> ...all information that describes, locates, or indexes anything about an individual including his education, financial transactions, medical history, criminal, or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and the record of his presence, registration, or membership in an organization or activity, or admission to an institution;[76]

Agencies are required to "maintain a list of all persons having regular access to personal information in the information system"[77] and could presumably, in the case of records public by law, simply note that all persons would have access to such "personal information." Agencies are required to seek the permission of data subjects in order to disseminate all or part of filed information to those "not having regular access authority."[78] Unless the agency had previously

BEST COPY AVAILABLE

stated that, because the record involved was a public record by law, it was open to all members of the public, the permission of the data subject would, under H.R. 14493, have to be sought in each case where public access was sought to "personal information" even though contained in a public record. Since data subjects are, when their consent is sought, also supposed to be informed of the use intended for the personal information, federal agencies would perhaps be allowed to inquire as to the intended use of the public record planned by the requester, while most interpretations of the Federal Freedom of Information Act have stressed that the purpose for which access to public records is sought is irrelevant to a Freedom of Information Act request. It should also be noted that H.R. 14493 provides both criminal and civil enforcement procedures: under the criminal penalty "any responsible officer of a Federal agency who willfully-...(2) issues personal information in violation of this Act... shall be fined not more than $10,000 in each instance or imprisoned not more than five years, or both."[79] Civil penalties provide that persons violating the Act are liable to aggrieved persons for actual and punitive damages as well as the recovery of costs and attorney's fees.[80] Such penalties should greatly discourage the dissemination of personal information when, in the minds of records custodians, there is any doubt that the information sought may or may not be exempt from the privacy act.

Bills similar to the "Goldwater-Koch" act have been presented in the Senate and hearings have been held upon them by an ad hoc privacy subcommittee of the Government Operations Committee and the Constitutional Rights Subcommittee of the Judiciary Committee chaired by Senator Sam Ervin. Several basically similar bills submitted between October 1973 and June, 1974 were heard by this ad hoc subcommittee in hearings held June 18, 19, 20, 1974.[81] The debt of all of these bills to the House has been recognized by Senator Ervin:

> The bill we introduce today (S. 3633) follows the line generally expressed in these bills (S. 3418, S. 2542, S. 2810) and in those

BEST COPY AVAILABLE

introduced in the House by Congressmen Koch and Goldwater. Indeed, each of the Senate bills are variations of the model first prepared by those two gentlemen, and the debt that the Senate bills owe is apparent by a comparison of their texts.[82]

Among witnesses testifying at the hearings of the ad hoc subcommittee were: Representatives Koch, Litton and Goldwater, Jr.; former Secretary of Health, Education and Welfare Elliott Richardson; Drs. Alan Westin and Christopher Pyle;[83] Dr. Ruth Davis and Mr. Vincent Barabba of the Department of Commerce; Mr. Philip Buchen and Mr. Douglas Metz of the Domestic Council Committee on the Right of Privacy; Ms. Hope Eastman of the ACLU; Dr. Martin Larson of Liberty Lobby; Mr. Stanley Salett and Mr. Stuart Sandow of the National Committee for Citizens in Education;[84] Mr. Arthur Sampson, Administrator, General Services Administration; Dr. Clay T. Whitehead, Director, Office of Telecommunications Policy; Ms. Donna Schiller of the League of Women Voters; Dr. Elmer Gabrieli of the Joint Task Group on Ethical Health Data Centers; State Senator Stanley Aroholt of Ohio representing the National Legislative Conference; Mr. Andrew Atkinson of Government Management Information Systems; and Mr. Daniel Magraw (of Minnesota), Mr. Jerry Hammett and Mr. Charles Tigg representing the National Association for State Information Systems.[85] Only one mass media representative testified, Mr. Richard M. Schmidt, Jr., Counsel for the American Society of Newspaper Editors.[86]

While there are differences between the main Senate personal data bill (S. 3633 introduced by Sens. Ervin, Bayh, Goldwater, Kennedy and Mathias) and the House bills, none of these differences occur in the area of conflict between access to information and privacy principles. Both Senate and House bills use identical defintions of "personal information", both require the listing of all persons having regular access, both require the seeking of the data subject's permission in order to disseminate personal information to those without regular access authority and neither specifically provides for what shall be done about personal data appearing in a record which is a

BEST COPY AVAILABLE

public record by law. In late July, 1974, staff of the ad hoc subcommittee was attempting to draft a new version of the bill which could be approved by the subcommittee and sent to the parent committees but that staff draft had not been made public.[87] Conceivably some of the difficulties of reconciling these general personal data privacy bills with access to records statutes may arise from work of the Senate or House committees which may consider the bills in the next few weeks. One press report indicates a strong bipartisan effort to get the personal data bills out of the House by August 12, hence, prior to House consideration of bills of impeachment, and stresses that the House draft "is designed to attract broad support and quick passage."[88] Accordingly it seems likely that any version coming out of the House will (1) not attempt to deal with criminal justice data, but leave such data for further, specific, legislation and (2) not attempt to enact an administrative board or agency to exercise oversight over the privacy law, as proposals for such independent agencies have retarded progress of general privacy bills in the past.

Within the Executive branch of government there has been some action in the privacy area with potential significance for the press. Following a radio address of President Nixon on privacy on February 23, 1974,[89] a Domestic Council Committee on the Right of Privacy, chaired by Vice President Ford was established. The Committee has a broad mandate to study problems of personal privacy and recommend appropriate Federal action, ranging from legislation to simple internal improvements in administrative practice. Even before selection of the committee staff, Vice President Ford was being widely given credit in Washington for getting President Nixon to withdraw Executive Orders 11687 and 11709 which, for a time, permitted inspection by the Department of Agriculture of farmers' income tax returns, a practice regarded by some as a violation of the farmers' privacy.[90] In late April, 1974, the Domestic Council Committee on the Right of Privacy expected to

BEST COPY AVAILABLE

begin making proposals to the Vice President by mid-June,[91] and the committee actually did consider fourteen "initiatives" in an early July meeting, although none of these initiatives dealt with a general protection of privacy of all personal data. The Executive Director of the Subcommittee, Mr. Philip Buchen, testified June 19, 1974 to Senator Ervin's ad hoc privacy subcommittee, then considering general privacy of personal information legislation. While Mr. Buchen was in favor of the committee's general objectives, he expressed some doubts that a single bill should be applied to all data systems stressing a need for variety and legislative experimentation and cautioning against overlooking "...the complexity of the problems involved or...debate on questions of the scope, timing, and suitability of different possible remedies for advancing the cause of personal privacy without inhibiting government or business in its proper functions...Controls of information practices ought to accommodate for situations where the problems are not alike and where the same remedies are not equally workable or useful."

Also within the Executive branch, and at one time of great potential significance, is a Freedom of Information Study Unit connected with the Department of Justice.[94] The study unit has a budget, through June, 1975 of approximately $300,000 to study the implementation and effectiveness of the Federal Freedom of Information Act and to make recommendations, if necessary, for changes in the law, in agency regulations implementing it, or in agency practices and procedures. Mr. Jerry Clark was director of the study when interviewing was first conducted for this paper. Clark seemed well aware of the potential conflict between privacy, particularly privacy of personal data, and the Freedom of Information Act and expected that this might be an area in which legislative changes might be recommended. He planned to mainly depend on the Domestic Council study, and on Congress, for most of the groundwork on privacy problems anticipating that the Freedom of Information Study Unit itself would devote

BEST COPY AVAILABLE

staff effort to privacy problems only if the work of the Domestic Council Committee or Congress proved insufficient. Clark appeared to have good credibility with significant groups on Capitol Hall and the study group might have had a significant impact on both Freedom of Information and privacy legislation.

Clark's resignation as director of the study unit on June 8, 1974 appears to make it unlikely that the unit will be effective or influencial. The circumstances surrounding Clark's resignation are clouded and Clark has said little publicly about it. Knowledgable Washington sources attribute the resignation to a conflict between Clark and Attorney General William Saxbe over the autonomy granted the study group by former attorney general Elliott Richardson who first approved the project. In his April interview, Clark stressed that Richardson had granted him full autonomy of staff selection and the right to publish a final report without review by the Justice Department.[95] Washington sources indicate that Saxbe (1) vetoed some early staff selections and (2) sought to renegotiate the independent publication agreement between Clark and Richardson and that the result was Clark's resignation. Washington expectations now are that some study will be done, but that it will be closely supervised by the Justice Department. Accordingly it is unlikely to consider the difficulties of squaring Freedom of Information and privacy principles.

PRIVACY AND ACCESS TO RECORDS: Problems of Conceptualisation and some Suggested Answers

It has been repeatedly mentioned in this paper that the effort to protect privacy of "personal data" has conflicted, both theoretically and, in Minnesota, at least practically, with the concept of public access to public records. Why has this occurred and what, if anything, might be done to help strike a better balance between these competitors and lead to a more satisfactory resolution of the conflict than is exemplified by the Minnesota holding action?[96] Certainly this problem cannot begin to be solved here, but certain dimensions of it may be illuminated.

BEST COPY AVAILABLE

First, all parties involved, particularly those who have been close to battles for statutory access to records laws should begin to recognize that the computer threatens to make "records" an outmoded concept. Public records can now be computerized in such a fashion that the computer cannot regurgitate the entire original record but rather that certain information components of it may be separately recalled. The important concept, now, is not public records but rather public information.[97] Unfortunately, many state access to public records laws are not at present written so that they may easily take into account this shift from "records" to "information" - certainly the Minnesota law is not so written. Accordingly, existing state access laws which create rights of access to entire records run head-on into efforts to protect the privacy of some information. The problem is not quite so severe at the Federal level as the Federal Freedom of Information Act has, at least as judicially construed, begun to deal with the concept of information - judges ordering, for example, that information properly exempt from disclosure under the act must be separated from information not properly exempt, with the latter being disclosed.[98] In order for the conflict between privacy of personal data and access to public records to begin to be resolved it must get to a point where both sides are talking about the same concept - information. Freedom of Information advocates, it would seem, must turn their attention from records and toward the narrower concept of information.

Second, Freedom of Information and privacy advocates must come together to jointly consider their mutual problems. Frequently they now exist in adversary roles - and adversary institutions. A staff member of the Senate Constitutional Rights Subcommittee working on the Ervin privacy bill said in an interview that there was no conflict between Freedom of Information and privacy of arrest record information. That statement is simply untrue. At the Federal level there are structural reasons why access to records and privacy people do not get together; in the Senate, privacy matters are usually

BEST COPY AVAILABLE

referred to the Constitutional Rights Subcommittee and Freedom of Information matters to the Administrative Practice and Procedure Subcommittee. Both are subcommittees of Senate Judiciary but, as is well known, the most important stage in the Federal legislative process if often that of subcommittee staff work. With different staffs working on privacy and freedom of information little common ground is explored. Until recently the problem has been even more serious in the House. There Freedom of Information related bills go to the Foreign Operations and Government Information subcommittee of House Government Operations, while most privacy matters are referred to a subcommittee of the House Judiciary committee. In the House, then, the two areas of interest have generally not even met at the committee level. Consideration of the Goldwater-Koch bill by the Foreign Operations and Government Information Subcommittee breaks this pattern and may, indeed, have occurred because of the bottleneck in the Judiciary committee attributable to impeachment. Whether this subcommittee can successfully reconcile Freedom of Information and privacy principles remains to be seen.

The problem is, of course, not only structural - it is also substantive. Although this assertion would be difficult to document, Freedom of Information proponents seem more generally concerned with the broad sociological impact of denying access to public records upon the public's right to know while privacy advocates, essentially humanists, are more attuned to the personal and psychological impact of violations of privacy upon the individual. Ideally the two rights should be compared and juxtaposed on comparable levels - the social as opposed to psychological would seem most appropriate - which would pit the social value of an informed public against the social benefits of having some rights to privacy and secrecy. Instead the conflict nearly always gets stated in incomparable terms, as in this quotation from Arthur Miller:

> The conflict between the general public's right to know what its government is doing and the individual's right to have some control over the dissemination of personal information held by the government is an extremely difficult one to resolve.[99]

BEST COPY AVAILABLE

In addition, Freedom of Information and privacy advocates define the purpose of access to public records statutes quite differently. To privacy advocates, the sole purpose of access to public records laws is to facilitate understanding of the functioning and operations of government, and much such understanding can be gained without access to personal data. Statements from the HEW advisory group report and from Arthur Miller express this viewpoint: the HEW report claims that the act's purpose is "protecting the public's 'right to know' about the activities of the Federal government"[100] while Miller notes that the act's "stated purpose is to insure that the public has access to enough governmental information to enable it to scrutinize the activities of federal administrators."[101]

Yet, it must be candidly admitted, journalists use the Freedom of Information Act to find out much more than just information about government - it is, indeed, used to find out information about people who are involved in government or with government. And should it not be so? Certainly the trend in libel law in the last decade has been to make it increasingly difficult for persons involved in public affairs to sustain libel actions, as the "actual malice" rule applied to public officials in New York Times v. Sullivan[102] and to public figures[103] indicates. Surely it would be contrary to the spirit of this line of libel protection for the press to make all information about any person, found in public records, non-public under theories of privacy of personal data.

These tensions will not really begin to be resolved until Freedom of Information and privacy advocates come together in a common forum. So far this has not really occurred: the current work of the House Foreign Operations and Government Information Subcommittee offers some hope, so did the Freedom of Information Study Group but that hope is now diminished. Rather, the HEW advisory committee is typical of how groups which at least plan to study

BEST COPY AVAILABLE

both problems usually end up being dominated by one side or the other. The advisory group heard testimony, some 61 presentations, from 113 individuals. Only one presentation, participated in by three people[104] was devoted to the Freedom of Information Act.[105] The Committee contacted 252 organizations that it thought would have some interest in its work. It says about 110 replied. Only eight of the 252 organizations were media related to the extent that they would be likely to have some interest in the Freedom of Information dimensions of the committee's work. None of these eight organizations were among the 22 who provided copies of completed studies or policy statements dealing with the handling of records about identifiable individuals.[106] To be perfectly fair, privacy zealots are equally lacking in the studies of Freedom of Information made by both House and Senate.[107] Freedom of Information and privacy groups, it appears, although certainly aware of one another, simply are not talking much to each other even in those few available forums where they might meet. Yet, somehow, communication between these factions must increase or no satisfactory resolution can ever be reached to their inherent conflicts.

One conflict that is building rapidly, and appears especially fundamental, concerns "interest" in records sought. A major thrust of statutory rights of access to records legislation, already mentioned, has been to remove the need to show an interest in records sought which was so often required under the common law. Yet, to privacy advocates, knowledge of the reason information is sought and the uses to which it will be put are all important - they often determine, in fact, whether one release of information is an invasion of privacy or not. As the HEW report poses the problem "... most systems can be quite well defended against 'unauthorized' access...The problem is how to prevent 'authorized' access for <u>'unauthorized' purposes</u>..."[108]

BEST COPY AVAILABLE

Arthur Miller states the tension created by the Freedom of Information Act's lack of concern with "interest" and the privacy advocate's near obsession with it more directly:

> The Information Act also provides that the contents of the files are available to 'any person.' This mandate may be so encompassing that it will prevent courts from reaching a sensible accommodation between the threat to individual privacy and the importance of public access to governmentally held information...I have...heard several agency officials suggest that the decision whether to disclose data should depend in part on the identify of the requesting party and the purpose to which the information will be put.[109]

Whatever Mr. Miller may have heard, however, courts have consistently rejected any inquiry intb the "interest" of an information seeker. As a practical guide to the use of the act, prepared by a Ralph-Nader-related organization notes, "...With one exception..., you do not have to explain the reasons for your demand, nor do government employees have any right to ask."[110] This conflict is surely one of the most basic themes which divide those seeking to protect privacy of personal data from those seeking to protect rights of access to governmental records for, as the HEW advisory group observed:

> It is difficult...to define personal privacy in terms that provide a conceptually sound framework for public policy about records and record keeping...For any one individual, privacy, as a value, is not absolute or constant; its significance can vary with time, place, age and other circumstances. There is even more variability among groups of individuals. As a social value, furthermore, privacy can easily collide with others, most notably free speech, freedom of the press, and the public's "right to know."[111]

If the inevitable collision between access to public records forces and privacy forces is to be exploited so as to be as beneficial to the public good as possible, privacy and Freedom of Information advocates must begin to meaningfull share ideas and communicate. Perhaps they must ultimately propose omnibus records laws which - almost from the cradle to the grave of a record - shepherd the making and keeping of records and, along the way, consider both privacy and public access values. Perhaps the competing values can be reconciled by less than comprehensive omnibus records legislation, so long as the proponents of separate laws keep track of the activities of those

BEST COPY AVAILABLE

in the other camps. What is important is that the conflict be recognized and solved, not dodged; that adequate data be accumulated to assess its dimensions and that the public's interest, rather than private commitments to "right to know" or "right-to-be-let-alone" ideology, lead ultimately to the best possible reconciliation of these competing but vital social values.

BEST COPY AVAILABLE

BACKNOTES

1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review, 4 (December 1890) 193.

2. Passim., Griswold v. Connecticut, 381 U.S. 470, 85 S.Ct. 1679, 14 L.Ed.2d. 510 (1965).

3. Ibid.

4. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d. 542 (1969).

5. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d. 147 (1973).

5a. NAACP v. Alabama (Associational privacy), 357 U.S. 449, 78 S.Ct. 1163, 2L.Ed.2d 1488 (1958); Talley v. Calif., (private-anonymous-publication), 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); plus, of course, nearly all 4th Amendment cases - freedom from unreasonable searches and seizures.

6. 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456.

7. 376 U.S. 255, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

8. Perhaps the distinction is that the Court is willing to create a right of privacy against governmental intrustion (Griswold, Stanley and Roe)but is more hesitant to create a Constitutional right of privacy from intrusion by private power sources (Time, Inc. v. Hill).

8a. California Bankers Ass'n v. Shultz, 94 S.Ct. 1949 (1974).

9. See: Don R. Pember, Privacy and the Press, University of Washington Press, Seattle, 1972 and Arthur R. Miller, The Assault on Privacy, New American Library, New York, 1972, particularly Chapter V, pp. 184-224.

10. Harold L. Nelson and Dwight L. Teeter, Law of Mass Communications, 2nd edition, Foundation Press, Inc., Mineola, New York, 1973, p. 194.

11. Pember, Privacy and the Press, p. 199.

12. Ibid., p. 249.

13. Nelson and Teeter, Law of Mass Communication, p. 469.

14. 5 U.S.C. Sec. 552.

15. That access to public records had to be non-discriminatory was established in Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp. 8 (S.C. Iowa 1971).

16. But see Nelson and Teeter, Law of Mass Communications, pp. 475-476.

17. 5 U.S.C. sec. 552(a)(3).

18. Pember, Privacy and the Press, pp. x-xi.

19. Ibid., p. ix.

20. 15 U.S.C. secs. 1681-1681t.

21. See infra, p. 20.

22. Reporters' Committee for Freedom of the Press, Press Censorship Newsletter, No. IV, April-May, 1974, Washington, D.C., p. 29.

BEST COPY AVAILABLE

23. U.S. Department of Health, Education and Welfare, Records, Computers and the Rights of Citizens, Report of the Secretary's Advisory Committee on Automated Personal Data Systems, Washington, D.C., 1973. Hereinafter, HEW Report.

24. Ibid., pp. xix-xxxv.

25. Ibid. p. 49.

26. Ibid. p. 56.

27. Ibid. pp. 57-58.

28. Ibid. pp. 61-62.

29. Ibid. pp. 62-63.

30. Ibid. pp. 63., 102-106.

31. The nine exemptions, codified as 5 U.S.C. sec. 552(b)(1-9) are as follows: (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data, including maps, concerning wells.

32. HEW Report, pp. 65-66. This may be an unnecessary observation on the Advisory Committee's part. Congress is constantly complaining that the "discretion" to claim or not claim an exemption from mandatory disclosure is abused in exactly the opposite direction feared by the HEW group. Congressional testimony tends to suggest that when records custodians have an opportunity to exercise their discretion they generally do not disclose the information. See, passim, U.S. Congress, House, U.S. Government Information Policies and Practices - Administration and Operation of the Freedom of Information Act, Parts 4,5, and 6, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d. sess., 1972.

33. HEW Report, p. 63.

34. HEW Report, pp. 35-36. Two comments are in point on this passage. First, the advisory committee is reading exemption (6) to the FOI act in an over-broad way. There is no general right to refuse to disclose information which would constitute a clearly unwarranted invasion of personal privacy. Only such information when contained in "personnel and medical files and similar files" may be witheld consistent with the law. Second, the committee

BEST COPY AVAILABLE

views on the FOI Act seem to be nearly identical to the prior expressed views on the privacy deficiencies of the Act of Arthur R. Miller. This is rather sensible, as Miller was a member of the HEW advisory committee. In his Assault on Privacy, Miller said the following of the Freedom of Information Act and its impact on privacy: "In the past the relative inaccessibility and decentralized character of federal records, coupled with a bureaucratic reluctance to open the files to outsiders, provided the requisite safeguards against public scrutiny of governmental data. But the utility of these restraints has been sharply reduced by the enactment in 1967 of a statute - loftily entitled the Freedom of Information Act - that requires the disclosure of broad categories of information held by governmental agencies...By establishing an across-the-board statutory policy directing disclosure of governmental records, the Act reverses the traditional presumption in favor of a citizen's personal privacy, and places the burden on the information-holding agency to find a specific statutory ground for refusing to honor a request for disclosure. In some instances the Act not only has tipped the scales in favor of disclosure, but it has done so with a very heavy hand...Ironically, although the Information Act permits anyone who has been denied access to an agency's files to seek a court order compelling disclosure, it does not assure that notice will be given...to the party whose interest is being jeopardized by the request - the individual who is the subject of the data. A statutory scheme that requires the exposure of personal data unless someone demonstrates that doing so 'would constitute a clearly unwarranted invasion of privacy' and then fails to provide a mechanism for giving notice to the person most interested in (and capable of) discharging that burden, sounds like something from the 'theater of the absurd.'" Miller, Assault on Privacy, pp. 168, 169, 171, 172.

35. HEW Report, p. 36.

36. Interview with Dan Magraw, May 13, 1974.

37. Interview with Dean Lund, May 14, 1974.

38. Interviews with Dan Magraw, May 13, 1974 and Dean Lund, May 14, 1974.

39. Codified as Minnesota Statutes, sec. 16.91.

40. Interview with Dan Magraw, May 13, 1974.

41. Interview with Dan Magraw, May 13, 1974 and letter from Dan Magraw to Senator Robert Tenneson, November 14, 1973 in the files of the Subcommittee on Problems of Privacy.

42. Interview with Dan Magraw, May 13, 1974.

43. Interview with Dan Magraw, May 13, 1974 and letter from Dan Magraw to Senator Robert Tenneson, November 14, 1973 in the files of the Subcommittee on Problems of Privacy.

44. Minnesota House of Representatives, 68th Session, H.F. 1316 (1973), p. 2, lines 4-8.

45. Letter from Dan Magraw to Senator Robert Tenneson, November 14, 1973 in the files of the Subcommittee on Problems of Privacy.

BEST COPY AVAILABLE

46. Minnesota House of Representatives, 68th Session, H.F. 1316 (1973), p. 2, line 22.

47. Ibid., p. 3, lines 1-36 and p. 4, lines 1-13.

48. Conversations with John Finnegan and Robert Shaw throughout the 1974 legislative session.

49. Minnesota House of Representatives, 68th Session, H.F. 1316 (1973), p. 2, lines 25-27.

49a. Interview with Jerome Segal, May 13, 1974.

50. Interview with Dean Lund, May 14, 1974.

51. Interview with Jerome Segal, May 13, 1974.

52. Intergovernmental Information Services Advisory Council (IISAC), Data Security and Privacy Committee, Report 1, 1974, pp. 3,5. A Xerox of the report is in the author's files.

53. Tennessen, Robert J., Memorandum to Members of the Subcommittee on the Problems of Privacy Re: Remarks on privacy issues to the subcommittee, November 9, 1973. Xerox of the memorandum is in the author's files.

54. Minnesota House of Representatives, 69th Session, S.F. 2587. (1974). All four of these bills were first reviewed by the subcommittee during a February 5, 1974 meeting.

55. Minnesota House of Representatives, 69th Session, S.F. 2588 (1974).

56. Minnesota House of Representatives, 69th Session, S.F. 2589 (1974).

57. Minnesota House of Representatives, 69th Session, S.F. 2689 (1974).

58. Interview with Robert Tennessen, May 14, 1974.

59. Interview with Mark Gittenstein, April 20, 1974.

60. The prime industry representative was Mr. Curt Fritze of Control Data Corporation. His testimony can be reviewed on the tapes of the subcommittee's meetings of February 7 and 14, 1974, in the possession of the subcommittee.

61. Segal testified at the meetings of February 7, 12, 14 and 28th.

62. Laws 1974, Chapter 479, p. 2, lines 20-22. Magraw testified at the meetings of February 5, 12, 14, 28, and March 5. A lengthy letter from him was read into the record at the November 15, 1973 meeting.

63. See testimony of Norman P. Yarosh, Project Director, Municipal Information System, City of Saint Paul, at the February 12, 1974 meeting.

64. See testimony of Ronald J. Lang, Supervisor of Program and Agency Analysis Section, Department of Public Welfare on February 14, 1974 and March 5, 1974.

65. The study was commissioned to the author of this paper. He served as a consultant to media interests during consideration of these bills.

BEST COPY AVAILABLE

66. Laws 1974, Chapter 479, sec. 7. The author of this paper wrote the language of this restrictive application clause, at the request of the media interests.

67. Interviews, throughout the legislative session with Robert Shaw and John Finnegan and with Robert Tennessen on May 14, 1974.

68. The hearings have not yet been published. I was able to consult typed transcripts of portions of the hearings while in Washington, D.C., however, through the courtesy of the subcommittee.

69. U.S. Congress, House, Security and Privacy of Criminal Arrest Records, Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 13315, 92d Cong., 2d sess., 1972. Other hearings have not yet been published.

70. Interview with Alan Parker, Washington, D.C., April 20, 1974.

71. Testimony of Harold W. Andersen, Vice Chairman, American Newspaper Publishers Association; Richard M. Schmidt, Jr., Counsel for the American Society of Newspaper Editors and John R. Finnegan, chairman, Freedom of Information Committee, Associated Press Managing Editors Association to the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, Wednesday, March 13, 1974. I examined a typed transcript. Publication of the hearings is planned.

72. Typed transcript of testimony before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, Wednesday, March 13, 1974, Criminal Justice Data Bank, Vol. 5, pp. 471-472.

73. Telephone interview with Mark Gittenstein, July 22, 1974.

74. Congressional Record, April 2, 1974, pp. H 2438-2495.

75. H.R. 12206, sec. (a)1, 93d Cong., 2d sess.

76. H.R. 14493, sec. 3(2), 93d Cong., 2d sess.

77. H.R. 14493, sec. 4(a)(8), 93d Cong., 2d sess.

78. H.R. 14493, sec. 4(d)(2), 93d Cong., 2d sess.

79. H.R. 14493, sec. 10, 93d Cong., 2d sess.

80. H.R. 14493, sec. 11, 93d Cong., 2d sess.

81. S. 2542 (Bayh, Oct. 8, 1973), 93d Cong., 2d sess.; S. 2810 (Goldwater, Dec. 13, 1973), 93d Cong., 2d sess.; S. 3116 (Hatfield, March 6, 1974), 93d Cong., 2d sess.; S. 3418 (Ervin, Percy, Muskie, May 1, 1974), 93d Cong., 2d sess.; S. 3633 (Ervin, Bayh, Goldwater, Kennedy, Mathias, June 12, 1974), 93d Cong., 2d sess.

82. Congressional Record, June 12, 1974, S 10453.

BEST COPY AVAILABLE

83. Testimony of June 18, 1974. Congressional Record, June 18, 1974, D 710.

84. Testimony of June 19, 1974. Congressional Record, June 19, 1974, D 719.

85. Testimony of June 20, 1974. Congressional Record, June 20, 1974, D 727.

86. Testimony of June 19, 1974. Congressional Record, June 19, 1974, D 719.

87. Phone call to the Ervin staff, July 22, 1974.

88. Minneapolis Tribune, July 23, 1974, p. 7B.

89. Office of the White House Press Secretary, Address by the President on the American Right of Privacy and Fact Sheet on the President's Address on the American Right of Privacy, Feb. 23, 1974, mimeos. The President also mentioned the right of privacy in his 1974 State of the Union message.

90. See U.S. Congress, House, Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers' Income Tax Returns, Hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong., 1st sess., 1973. The subcommittee's counsel credits the Vice President for getting the President to withdraw the orders in question, interview with James Kronfeld, April 20, 1974. The Vice President is also given credit for this by several congressmen during the special order on Congressional commitment to privacy, Congressional Record, April 2, 1974, H 2438-2495.

91. Most information reported here on the activities of the Domestic Council Committee on the Right of Privacy came from an interview with Douglas Metz, April 18, 1974.

92. Domestic Council Committee on the Right of Privacy, Fact Sheet, July 10, 1974, mimeo.

93. Statement of Philip W. Buchen, Executive Director, Domestic Council Committee on the Right of Privacy, Incorporating a Communication of the Vice President to the Senate Government Operations Ad Hoc Subcommittee and the Judiciary Subcommittee on Constitutional Rights Concerning the Right of Privacy, June 19, 1974, mimeo., pp. 6-7, 12.

94. Information on this study unit was partially gathered during an interview with Jerry Clark, April 19, 1974.

95. Interview with Clark, April 19, 1974.

96. Nothing derogatory is meant by the term "holding action." There may well be advantages to not attempting to reach a full reconciliation of access and privacy rights without experience in how the privacy of personal data bill operates. By, for the present, exempting it from applying to public records there may be an opportunity to gather information on the bill's operation which will make any ultimate reconciliation of the concepts easier.

BEST COPY AVAILABLE

97. A footnote in the HEW study suggests some dimensions of the problem of disappearing "records": "It should be noted that the same characteristics of automated systems which inhibit the compilation of dossiers can also inhibit efforts by the press and public interest groups to penetrate the decision-making processes of record-keeping organizations and expose them to public scrutiny. This is particularly true when organizations destroy 'hard-copy' records after putting the information in them into computer-accessible form. In such cases, the computer can become a formidable gatekeeper, enabling a record-keeping organization to control access to public-record information that previously had been available to anyone with the time and energy to sift through its paper files. The same programming costs that make it uneconomical for law enforcement investigators and private detectives to 'fish' in the automated files of a credit bureau could also make it prohibitively expensive for private citizens to examine public records." HEW Report, p. 21, note 7.

98. See Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)

99. Miller, Assault on Privacy, p. 169.

100. HEW Report, p. 66.

101. Miller, Assault on Privacy, p. 168.

102. 376 U.S. 245, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

103. For example, Pauling v. News Syndicate Co., Inc., 335 F.2d. 659 (2d Cir. 1964). Gertz v. Welch, 42 LW 5123 (1974) does, of course, indicate the current outer-bound to the application of the New York Times rule as not applying to purely private persons.

104. They were St. John Barrett, Deputy General Counsel, Department of Health, Education and Welfare; William H. Small, Vice President, CBS News; and Samuel J. Archibald, Executive Director, Fair Campaign Practices Committee, Inc., HEW Report, p. 153.

105. Of the group, Archibald is the only one with an extensive background in the Freedom of Information Act from a media perspective.

106. The eight media related organizations were: the American Newspaper Publishers Association; the American Society of Newspaper Editors; the Association of American Publishers; the Freedom of Information Center, University of Missouri at Columbia; the Joint Media Committee; the National Association of Broadcasters; the Newspaper Guild and Sigma Delta Chi. HEW Report, pp. 159-166.

107. See, among many possible materials, U.S. Congress, House, The Freedom of Information Act, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong., 2d sess., 1974 and U.S. Congress, Senate, Freedom of Information, Executive Privilege, Secrecy in Government, Vols. 1,2, and 3, Hearings before Subcommittees of the Committee on the Judiciary and the Committee on Government Operations, Senate, on S. 1142, S. 858, S.Con.Res. 30, S.J. Res. 72, S. 1106, S. 1520, S. 1923 and S. 2073, 93d Cong., 1st sess., 1973.

BEST COPY AVAILABLE

108. HEW Report, p. 19, emphasis added.

109. Miller, Assault on Privacy, p. 170.

110. Freedom of Information Clearinghouse, The Freedom of Information Act: What it is and How to Use It (Pamphlet), Washington, D.C. 1974.

111. HEW Report, p. 38.

BEST COPY AVAILABLE

BIBLIOGRAPHY

A) Published Materials:

Ernst, Morris L. and Alan U. Schwartz, Privacy: The Right to Be Let Alone, MacMillan Co., New York, 1962.

Freedom of Information Clearinghouse, The Freedom of Information Act: What it is and How to use it (Pamphlet), Washington, D.C., 1974.

Laws 1974 (Minnesota), Chapter 479. An Act relating to the collection, security and dissemination of records and information by the state and its political subdivisions; providing a civil cause of action; providing penalties.

Minnesota House of Representatives, 68th Session, H.F. 1316 (1973).

Miller, Arthur R., The Assault on Privacy, Computers, Data Banks and Dossiers, Signet Edition, New American Library, New York, 1972. Originally published by University of Michigan Press, Ann Arbor, Mich., 1971.

Nelson, Harold L. and Dwight L. Teeter, Law of Mass Communications, 2nd Edition, Foundation Press, Inc., Mineola, New York, 1973.

Pember, Don R., Privacy and the Press, University of Washington Press, Seattle, 1972.

Project SEARCH, Committee on Security and Privacy, Security and Privacy Considerations in Criminal History Information Systems, Technical Report No. 2, California Crime Technological Research Foundation, Sacramento, Calif., 1970.

Reporters' Committee for Freedom of the Press, Press Censorship Newsletter, No. IV, April-May, 1974, Washington, D.C.

Stevens, Jean, Access to Personal Data Files: I, Freedom of Information Center Report No. 288, University of Missouri School of Journalism, Columbia, Missouri, August, 1972.

_____, Access to Personal Data Files: II, Freedom of Information Center Report No. 291, University of Missouri School of Journalism, Columbia, Missouri, October, 1972.

U.S. Congress, House, Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers' Income Tax Returns, Hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong., 1st sess., 1973.

BEST COPY AVAILABLE

_____, Federal Information Systems and Plans - Federal Use and Development of Advanced Information Technology, Parts 1 and 2, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong., 1st sess., 1973.

_____, Federal Information Systems and Plans - Implications and Issues, Part 3, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 93d Cong., 2d sess., 1974.

_____, The Freedom of Information Act, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, on H.R. 5425 and H.R. 4960, 93d Cong., 1st sess., 1973.

_____, H.R. 12206, 12207, 13303, 13872, Bills to Amend the Freedom of Information Act, referred to the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations, House of Representatives, 93d Cong., 2d. sess., 1974.

_____, Records Maintained by Government Agencies, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, on H.R. 9527, 92d Cong., 2d. sess., 1972.

_____, Representative Barry Goldwater and others on Congressional Commitment to Privacy, 93d Cong., 2d. sess., April 2, 1974, Congressional Record - House, H. 2437-2495.

_____, Sale or Distribution of Mailing Lists by Federal Agencies, Hearings berore a Sucommmittee of the Committee on Government Operations, House of Representatives, on H.R. 8903 and Related Bills, 92d Cong., 2d. sess., 1972.

_____, Security and Privacy of Criminal Arrest Records, Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 13315, 92d Cong., 2d. sess., 1972.

_____, U.S. Government Information Policies and Practices - Administrati and Operation of the Freedom of Information Act, Parts 4,5, and 6., Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 1st sess., 1972.

_____, U.S. Government Information Policies and Practices - Problems of Congress in Obtaining Information from the Executive Branch, Part 8, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d. sess., 1972.

_____, U.S. Government Information Policies and Practices - Public Access to Information from Executive Branch Advisory Groups, Part 8, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d. sess., 1972.

_____, U.S. Government Information Policies and Practices - Security Classification Problems Involving Subsection (b)(1) of the Freedom of Informati Act, Part 7, Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Cong., 2d sess., 1972.

BEST COPY AVAILABLE

U.S. Congress, Senate, Freedom of Information, Executive Privilege, Secrecy in Government, Vols. 1,2, and 3., Hearings before Subcommittees of the Committee on the Judiciary and the Committee on Government Operations, Senate, on S. 1142, S. 858, S.Con.Res.30, S.J.Res. 72, S. 1106, S. 1520, S. 1923 and S. 2073, 93d Cong., 1st Sess., 1973.

_____, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Committee Print of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Senate, 93d Cong., 2d. sess., 1974.

_____, Right of Privacy Act of 1967, Parts 1 and 2, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Senate, on S. 928, 90th Cong., 1st sess., 1967.

_____, Senator Roman Hruska, Introduction of S. 2964, Criminal Systems Act of 1974, 93d Cong., 2d. sess, Congressional Record, February 5, 1974. (Pages not supplied, reproduced by Senator Ervin's office).

_____, Senator Sam J. Ervin and others, Introduction of S. 2963, the Criminal Justice Information Control and Protection of Privacy Act of 1974, 93d Cong., 2d. sess., Congressional Record, February 5, 1974. (Pages not supplied, reproduced by Senator Ervin's office).

_____, Senator Sam J. Ervin, Restricting the Use of Computerized Criminal Justice Information, 93d Cong., 2d. sess., Congressional Record, Senate, March 7, 1974. (Pages not supplied, reproduced by Senator Ervin's office).

U.S. Department of Health, Education and Welfare, Records, Computers and the Rights of Citizens, Report of the Secretary's Advisory Committee on Automated Personal Data Systems, Washington, D.C., 1973.

Westin, Alan, Privacy and Freedom, Atheneum, New York, 1967.

B) Unpublished Materials:

Federal -

Office of the White House Press Secretary, Address by the President on the American Right of Privacy, Mimeo, February 23, 1974.

_____, Fact Sheet on the President's Address on the American Right of Privacy, Mimeo, February 23, 1974.

_____, Remarks by Vice President Gerald R. Ford at the Opening Plenary Session of the National Governors' Conference, Washington, D.C., March 6, 1974 Mimeo.

U.S. Congress, Senate, Criminal Justice Data Bank, Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Typed Manuscript, Wednesday, March 13, 1974, Vol. 5. Made available in the office of the subcommittee to the author, April 20, 1974.

BEST COPY AVAILABLE

_____, Statements of Harold W. Andersen, Vice Chairman, American Newspaper Publishers Association; Richard M. Schmidt, Jr., Counsel for the American Society of Newspaper Editors and John R. Finnegan, chairman, Freedom of Information Committee, Associated Press Managing Editors Association to the Subcommittee on Constitutional Rights of the Committee on the Judiciary concerning hearings on S. 2963 and S. 2964, regulating criminal justice information. Copies provided the author by the subcommittee, in author's files.

State -

Intergovernmental Information Services Advisory Council (IISAC), Data Security and Privacy Committee, Report 1, 1974. Includes IISAC revisions to H.F. 1316, Minnesota House of Representatives, 68th Session, 1973. Xerox, in author's files.

Subcommittee on Problems of Privacy, Minnesota Senate. Miscellaneous documents, including minutes, relevant to the Subcommittee's activities from November, 1973 through March, 1974. On file with the Subcommittee, State Capitol, Saint Paul, Minnesota. Also audio tapes of Subcommittee meetings.

Tennessen, Senator Robert J., Drafts I through IV of a bill to regulate personal data in the State of Minnesota, 1974. Copies in author's files.

_____, S.F. 2587, S.F. 2689, S.F. 2588, S.F. 2589, 69th session, Minnesota Senate, 1974. Bills related to protection of and collection of personal data and the operation of personal data systems. Copies in author's files.

C) Interviews

Federal (Governmental) -

Clark , Jerry, Director of the Freedom of Information Study Unit, Dept. of Justice, Washington, D.C., April 19, 1974.

Gittenstein, Mark, Counsel, Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, Washington, D.C., April 20, 1974. July 22, 1974 (phone)

Kronfeld, L. James, Counsel, Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, Washington, D.C., April 20, 1974, July 22, 1974 (phone).

Margolis, Irene, Assistant Counsel, Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, Washington, D.C., April 19, 1974.

Metz, Douglas, Assistant Director, Domestic Council Committee on the Right of Privacy, Washington, D.C., April 18, 1974.

Parker, Alan , Associate Counsel, Subcommittee No. 4 of the Committee on the Judiciary, U.S. House of Representatives, Washington, D.C., April 20, 1974.

Sussman, Thomas M., Assistant Counsel, Administrative Practice and Procedure Subcommittee of the Senate Committee on the Judiciary, Washington, D.C., April 18, 1974.

BEST COPY AVAILABLE

Federal (Non-governmental)

Plesser, Ronald, Director, Freedom of Information Clearinghouse, Washington, D.C., April 17, 1974, July 22, 1974 (phone)

Minnesota (Governmental)

Lund, Dean, Chairman of the Intergovernmental Information Services Advisory Council (IISAC), Minneapolis, Minn., May 14, 1974.

Magraw, Dan, Assistant Commissioner of the State Department of Administration, St. Paul, Minnesota, May 13, 1974.

Segal, Jerome, Former Chairman of the IISAC Committee on Data Security and Privacy, St. Paul, Minnesota, May 13, 1974.

Tennessen, Robert, Chairman of Subcommittee on Problems of Privacy of the Minnesota State Senate Judiciary Committee, Minneapolis, Minn., May 14, 1974.

Minnesota (Non-governmental)

Finnegan, John, Executive Editor, St. Paul Pioneer Press and Dispatch. Several meetings during the 1974 session of the Minnesota legislature.

Shaw, Robert, Manager, Minnesota Newspaper Association. Several meetings during the 1974 session of the Minnesota legislature.

BEST COPY AVAILABLE

APPENDIX A: Laws 1974, Chapter 479* - the Minnesota privacy of data on persons act. Effective August 1, 1974.

* West Publishing Company's Minnesota Session Law Service has tentatively codified this chapter as M.S. Secs. 15.162-15.168. The office of the Revisor of Statute's, however, regards the West publication's codification as unofficial. No codified version of the law will be available until the publication of Minnesota Statutes 1974 in late 1974 or early 1975.

OFFICIAL RECORDS—COLLECTION, SECURITY AND DISSEMINATION

BEST COPY AVAILABLE

CHAPTER 479

H.F.No.1316

[Coded]

An Act relating to the collection, security and dissemination of records and information by the state and its political subdivisions; providing a civil cause of action; providing penalties.

Be it enacted by the Legislature of the State of Minnesota:

Section 1.

15.162 Collection, security and dissemination of records; Definitions

Subdivision 1. As used in sections 15.162 to 15.168 the terms defined in this section have the meanings given them.

Subd. 2. "Commissioner" means the commissioner of the department of administration.

Subd. 3. "Data on individuals" includes all records, files and processes which contain any data on any individual and which is kept or intended to be kept on a permanent or semipermanent basis. It includes that collected, stored, and disseminated by manual, mechanical, electronic or any other means.

Subd. 4. "Individual" means a natural person.

Subd. 5. "Political subdivision" includes counties, municipalities, towns and school districts. It includes any nonprofit corporation which is a community action agency initially organized to qualify for public funds.

Subd. 6. "Responsible authority" at the state level means any office established by law as the body responsible for the collection and use of any set of data on individuals or summary data. "Responsible authority" in any political subdivision means the person designated by the governing board of that political subdivision, unless otherwise provided by state law. With respect to statewide systems, "responsible authority" means the state official involved, or if more than one state official, the official designated by the commissioner.

Subd. 7. "State" means the state, the university of Minnesota, and any office, officer, department, division, bureau, board, commission or agency of the state.

Subd. 8. "Statewide system" includes any record-keeping system in which data on individuals is collected, stored, disseminated and used by means of a system common to the state or common to the state and one or more of its political subdivisions.

Subd. 9. "Summary data" means statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable.

Sec. 2.

15.163 Reports to the legislature

On or before December 1 of each year the commissioner shall prepare a report to the legislature. Summaries of the report shall be available to the public at a nominal cost. The report shall contain to the extent feasible at least the following information:

(a) A complete listing of all systems of data on individuals which is kept by the state and its political subdivisions, a description of the information contained therein, and the reason that the data is kept;

(b) A statement of which types of data on individuals, in the commissioner's opinion, are public records as defined by Minnesota Statutes, Section 15.17, which types of data are confidential and which types of data are neither;

(c) The title, name, and address of the responsible authority for the system and for each data bank and associated procedures:

(1) The categories and number of individuals in each category on whom data is or is expected to be maintained,

(2) The categories of data maintained, or to be maintained, indicating which categories are or will be stored in computer-accessible files,

BEST COPY AVAILABLE

(3) The categories of data sources,

(4) A description of all types of use made of data, indicating those involving computer-accessible files, and including all classes of users,

(5) The responsible authority's and the commissioner's policies and practices regarding data storage, duration of retention of data, and disposal thereof,

(6) A description of the provisions for maintaining the integrity of the data pursuant to section 15.164(d), and

(7) The procedures pursuant to section 15.165 whereby an individual can (i) be informed if he is the subject of data in the system, (ii) gain access to the data, and (iii) contest its accuracy, completeness, pertinence, and the necessity for retaining it; and

(d) Any recommendations concerning appropriate legislation.

Sec. 3.

15.164 Commissioner shall promulgate rules

The commissioner shall with the advice of the intergovernmental information services advisory council promulgate rules and regulations, in accordance with Minnesota Statutes, Chapter 15, which shall apply to the state and political subdivisions and shall implement the enforcement and administration of the following:

(a) Collection of data on individuals and establishment of related files of the data shall be limited to that necessary for the administration and management of programs enacted by the legislature or local governing body.

(b) Data on individuals shall be under the jurisdiction of the responsible authority. An individual shall be appointed to be in charge of each system containing data on individuals. The responsible authority shall document and file with the commissioner the nature of all data on individuals collected and stored and the need for and intended use of the data and any other information required by section 15.163. Use of data on individuals by other than the responsible authority or for other than intended uses, and the interrelation by manual, mechanical, or electronic means of data on individuals under the jurisdiction of two or more responsible authorities, may be permitted by the responsible authorities only when required by law or where clearly necessary to the health, safety or welfare of the public, or clearly in the interest of the individual involved.

(c) The use of summary data from data on individuals under the jurisdiction of one or more responsible authorities shall be permitted, subject to the requirements that the data be summarized by and under the direction of the responsible authority. Requests for use of the data must be in writing, stating the intended use and approved by the responsible authority. The responsible authority may, however, delegate such authority to the administrative officer responsible for any central repository of summary data. A reasonable fee may be charged for the summarization of data, and any additional cost caused by such summarization shall be borne by the requestor. Refusal of any request for use of summary data by the responsible authority or his delegate is appealable in accordance with Minnesota Statutes, Chapter 15. The responsible authority may delegate to a person outside of its agency its responsibility for summarizing data if it obtains a written agreement from the delegate providing for nondisclosure of data on individuals.

(d) Regarding the collection, storage, dissemination and use of data on individuals, the responsible authority shall establish reasonable and appropriate safeguards to assure that the data is accurate, complete and current. Emphasis shall be placed on the data security requirements of computerized files which are accessible directly via telecommunications technology, including security during transmission.

(e) Data on individuals shall be stored only so long as necessary to the administration of authorized programs or as authorized by statute.

Sec. 4.

15.165 Rights of subjects of data

The rights of individuals on whom the data is stored or to be stored and the responsibilities of the responsible authority shall be as follows:

(a) The purposes for which data on individuals is collected and used or to be collected and used shall be filed in writing by the responsible authority with the commissioner and shall be a matter of public record pursuant to section 15.163.

(b) An individual asked to supply personal data shall be informed of the purpose of intended uses of the requested data.

BEST COPY AVAILABLE

(c) An individual asked to supply personal data shall be informed whether he may refuse or is legally required to supply the requested data. He shall be informed of any known consequence arising from his supplying or refusing to supply the personal data.

(d) Data shall not be used for any purpose other than as stated in clause (a) of this section unless (1) the responsible authority first makes an additional filing in accordance with clause (a); (2) the legislature gives its approval by law; or (3) the individuals to whom the data pertain give their informed consent.

(e) Upon request to a responsible authority, an individual shall be informed whether he is the subject of stored data and if so, and upon his additional request, shall be informed of the content and meaning of the data recorded about him or shown the data without any charge to him. After an individual has been so informed, data need not be disclosed to him for six months thereafter unless a dispute or action pursuant to this section is pending. This clause does not apply to data on individuals which is defined by statute as confidential or to records relating to the medical or psychiatric treatment of the individual.

(f) An individual shall have the right to contest the accuracy or completeness of data about him. If contested, the individual shall notify in writing the responsible authority describing the nature of the disagreement. The responsible authority shall within 30 days correct the data if the data is found to be inaccurate or incomplete and attempt to notify past recipients of the inaccurate or incomplete data, or notify the individual of disagreement. The determination of the responsible authority is appealable in accordance with Minnesota Statutes, Chapter 15. Data in dispute shall not be disclosed except under conditions of demonstrated need and then only if the individual's statement of disagreement is included with the disclosed data.

Sec. 5.

15.166 Civil penalties

Subdivision 1. Notwithstanding Minnesota Statutes, Section 466.03, a political subdivision, responsible authority or state which violates any provision of sections 15.162 to 15.168 is liable to a person who suffers any damage as a result of the violation, and the person damaged may bring an action against the political subdivision, responsible authority or state to cover any damages sustained, plus costs and reasonable attorney fees. In the case of a willful violation, the violator shall, in addition, be liable to exemplary damages of not less than $100, nor more than $1,000 for each violation. The state is deemed to have waived any immunity to a cause of action brought under sections 15.162 to 15.168.

Subd. 2. A political subdivision, responsible authority or state which violates or proposes to violate sections 15.162 to 15.168 may be enjoined by the district court. The court may make an order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate sections 15.162 to 15.168.

Subd. 3. An action filed pursuant to sections 15.162 to 15.168 may be commenced in the county in which the individual alleging damage or seeking relief resides, or in the county wherein the political subdivision exists, or, in the case of the state, any county.

Sec. 6.

15.167 Penalties

Any person who willfully violates the provisions of sections 15.162 to 15.168 or any lawful rules and regulations promulgated thereunder is guilty of a misdemeanor. Any public employee who willfully violates sections 15.162 to 15.168 may be suspended without pay or discharged after a hearing as prescribed by law.

Sec. 7.

15.168 Application

Sections 15.162 to 15.168 shall not apply to data on individuals relating to criminal investigations. Nothing in sections 15.162 to 15.168 shall be construed to restrict or modify right of access to public records guaranteed by Minnesota Statutes, Section 15.17, or by any other statute.

Approved April 11, 1974.